Supreme Court, U. S.
FILED
NOV 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-337

CHESTER C. DAVIS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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The government's brief makes clear that the difference between the parties as to the scope and application of Rule 10b-5 is a fundamental one, thus emphasizing the need for an early and authoritative determination of the issue by this Court.

The government asserts that merely selling stock to depress the price is, in and of itself, a "scheme, or artifice to defraud" and thus a violation of the Rule. (Brief in Opposition ("Br.") at 7.) The nature of the "fraud" is nowhere identified. The government does not deny that the sales were real, not fictitious,

and that the stock was not sold in a deceitful manner. Indeed, in its statement of the question presented, the government says that the purpose of the conduct at issue was not to deceive or defraud at all, but rather "to force a sale of the corporation's assets". (Br. at 2.)

The government's position boils down to the assertion that Rule 10b-5's reference to a "scheme to defraud" may be expanded by liberal and flexible judicial interpretation so as to outlaw conduct that is not deceptive, and that Congress specifically declined to proscribe when it expressly defined a trading manipulation in Section 9 of the Securities Exchange Act. (*Compare* Br. at 8 *with* petition at 16-17.) Whatever the merit of the government's position, the dispute between the parties as to the proper role of Rule 10b-5 in the enforcement of the federal securities laws plainly presents an important question.

The government does not contend otherwise, but argues only that this Court's determination of the question should be delayed until such time as the petitioner may have been convicted of the novel offense created by the Court of Appeals, and the Court of Appeals has again decided the same question that is now presented by the instant petition. The course urged by the government is fraught with unfairness and inefficiency.

It would subject petitioner and the District Court to the burden and expense of a trial that would be completely unnecessary if the legal issue presented by the petition were decided in petitioner's favor. As this Court recognized in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 739-743 (1975), courts have an

obligation to decide legal issues that can obviate the need for time-consuming proceedings designed to prove factual contentions that may ultimately be determined to be legally insufficient. In *Blue Chip Stamps* itself, this Court granted certiorari to review a decision of the Court of Appeals that had reversed the District Court's dismissal of the complaint for failure to state a claim on which relief might be granted. 421 U.S. at 727.[1] This case is in the same procedural posture.

The fact that this case arises in a criminal context is an additional reason for review by the Court at this time. In *Blue Chip Stamps, supra,* 421 U.S. at 740, the Court recognized that the very pendency of even a civil action under the securities laws imposes collateral burdens on the defendant that ought not be prolonged by failure to decide a dispositive legal issue. That principle applies with special force here where the pendency of criminal proceedings has continuing adverse effects on petitioner.

Moreover, a trial conducted pursuant to the decision of the Court of Appeals, which admittedly offers little other than "political realities" to distinguish lawful conduct from an indictable offense (Appendix at 57a),

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[1] This Court has frequently granted certiorari to review the legal issues presented by a Court of Appeals' reversal of a district court's grant of a dispositive motion addressed to the complaint. For example, the Court granted certiorari in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 191 (1976), to resolve the legal question presented by the Court of Appeals' reversal and remand of the district court's grant of a motion for summary judgment. Similarly, the Court recently granted certiorari in *Santa Fe Industries, Inc.* v. *Green,* 45 U.S.L.W. 3249 (U.S. Oct. 4, 1976) (No. 75-1753), to review the decision of the Court of Appeals reversing the district court's grant of a motion to dismiss for failure to state a claim on which relief might be granted.

would be unjust and inefficient: the decision of the Court of Appeals provides neither guidance to the district court as to how to instruct the jury, nor notice to the petitioner of the nature of the crime with which he is charged. As to instructing the jury, the decision of the Court of Appeals and the argument of the government would make it a crime to sell stock for the purpose of depressing the price. A jury instruction based upon that standard would require a conviction in cases of undeniably lawful conduct such as, for example, that described at page 16 of the petition. There is plainly a present need for intelligent guidance as to the meaning of Rule 10b-5.

As to the nature of the offense charged, the government's brief simply compounds the confusion already engendered as to the nature of the charge against which petitioner is required to defend. At one point, the government's brief says that the victims of the claimed fraud were "all other sellers of Air West stock" (Br. at 7), even though it elsewhere concedes that petitioner did not induce such sales (Br. at 8.) At another point, the government's brief makes the delphic and contradictory pronouncement that the persons defrauded were purchasers of Air West securities. (Br. at 11.) Again, it is said in another place that the victim was "the market" (Br. at 13). It is also said variously that the victims of the claimed "fraud" were "other stockholders" of Air West and even "its directors".[2] (Br. at 7.)

The government is still unable to identify the nature of the claimed fraud. There is more than a little unfairness in the contention of the government that a

[2] No purchases or sales of stock by any such victims are alleged.

trial is necessary in order to identify with any precision the nature of the crime charged. (*Id.*) That is the function of an indictment in a criminal case. *Russell* v. *United States,* 369 U.S. 749 (1962). The failure of this indictment to do so is one more reason why this Court should not hesitate to decide the important questions presented by the petition.

Respectfully submitted,

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